Supreme Court, U.S.
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No. 00-219

In The

Supreme Court of the United States

CONCHO RESIDENTIAL SERVICE, INC.,

Petitioner,

v.

MHMR SERVICES FOR THE CONCHO VALLEY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Third Supreme Judicial District, At Austin, State Of Texas

TOM GREEN COUNTY'S BRIEF IN OPPOSITION

JAMES DAVID WALKER
Counsel of Record
701 Brazos Street, Suite 500
Austin, Texas 78701
Ph: (512) 320-9129
Fax: (512) 320-5821

CHARLES J. WITTENBURG
DAVIS, HAY, WITTENBURG, DAVIS & CALDWELL, L.L.P.
P.O. Box 271
San Angelo, Texas 76902-0271
Ph: (915) 658-2728
Fax: (915) 655-2278

Counsel for Respondent Tom Green County (Texas)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION

Respondent Tom Green County (Texas) respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision and opinion below.

STATEMENT OF THE CASE

Petitioner's claims grow out of a dispute between Petitioner and Respondent MHMR Services for the Concho Valley (herein "Concho Valley"). The gist of Petitioner's complaint is that Concho Valley failed to advertise and otherwise promote Petitioner's business. However, instead of limiting the dispute to Concho Valley, Petitioner eventually sued numerous individuals as well as virtually every entity which had any sort of real or imagined connection to Concho Valley (including Respondent Tom Green County).

It did not take the trial court long to find the flaws in Petitioner's claims and, consequently, the trial court undertook to end the case by a series of orders which granted take-nothing motions for summary judgment.[1] Petitioner, in a desperate attempt to salvage a case, engaged in what the federal courts most charitably call "seriatim pleading," being an attempt to stay one step ahead of the trial court by filing a series of amended and supplemental pleadings – the goal being to add new claims and parties faster than the trial court can eliminate

[1] CR1077,1281,1441,3929.

claims and parties.[2] This practice of seriatim pleading has been expressly condemned by the federal courts[3] and is, at the very least, disfavored by the Texas bench and bar.

Moreover, each of Petitioner's filings were voluminous,[4] Petitioner apparently being intent on accomplishing by volume what it could not accomplish by substance. Petitioner thereby shotgunned issues. Each filing added new issues as well as new phases and shades of old issues.

The practice of shotgunning by volume and the practice of adding new claims and variations on old claims carried over into the Texas Third Court of Appeals, wherein Petitioner tendered and sought leave to file a brief that exceeded 150 pages. Petitioner was ultimately granted leave to file a 65-page brief (exceeding by fifteen pages the standard page limitation for appellate briefs).

Respondent Concho Valley, the entity which allegedly wronged Petitioner, did nothing which would support the relief sought by Petitioner. Nevertheless,

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[2] 1st Amended Petition, CR2; 2nd Amended Petition, CR78; 3rd Amended Petition, CR1123; 4th Amended Petition, CR1331; 1st Supplemental Petition, CR2383.

[3] *See Union Planters National Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) (affirming denial of leave to amend pleadings because said amendment was offered only after summary judgment was granted).

[4] *See e.g.* 1st Amended Petition, CR2 (64 pages); 2nd Amended Petition, CR78 (64 pages); 3rd Amended Petition, CR1123 (64 pages); 4th Amended Petition, CR1331 (102 pages); Amended Response to Motion for Summary Judgment, CR255 (50 pages); Response to Motion for Summary Judgment, CR2971 (54 pages).

from Tom Green County's perspective, it is important to note that Tom Green County is not alleged to have been involved in the conduct by which Petitioner claims to have been harmed (the alleged failure to advertise and otherwise promote Petitioner's business). Instead, Tom Green County's liability is alleged to flow from the fact that Tom Green County is one of the entities which formed Concho Valley.

Tom Green County maintains, and the Texas courts agreed, that Tom Green County – in creating Concho Valley – did no more than that which Tom Green County was expressly authorized to do under Texas law. It helped form an independent and autonomous governmental entity that delivered governmental services.

It is also important to note that in the trial court Petitioner sought relief under the Texas antitrust act – and not under the federal antitrust act. Petitioner merely alludes to this fact in its procedural history. *See* Petition for Writ of Certiorari (herein PWC), p. 2 (Petitioner brought suit under Texas antitrust act). This fact should be stressed because the questions presented, and Petitioner's argument, might lead one to believe that relief was sought under the federal antitrust act. To the extent that federal antitrust law was raised below, it was presented only as an aid to construction of Texas antitrust law. The Texas antitrust act adopts federal antitrust exemptions. (Appendix, p. 6 – Section 15.05(g))

Furthermore, it should be stressed that Petitioner did not seek relief in the trial court under either federal Medicaid law or federal disability discrimination statutes. Petitioner structures its argument as if such relief had

been sought. *See e.g.* PWC, p. i (Question 4 – reference to Medicaid law) & p. 15 (reference to the Americans With Disabilities Act).

Tom Green County contends that Petitioner's analysis and resolution of the questions presented is faulty. However, this Brief in Opposition focuses for the most part on procedural defects which weigh against granting writ and on other issues not raised by Petitioner.

Nevertheless, Tom Green County does not accept Petitioner's "Statement of the Case." A number of assertions set out in the Petition for Writ of Certiorari are supported by neither law nor fact, including the following:

- that Concho Valley is an unincorporated association, pp. 2 & 14;
- that Tom Green County is a principal in an unincorporated association, pp. 2 & 14;
- that the trial court dismissed Petitioner's suit, p. 2 (the trial court in fact rendered a take-nothing judgment, Appendix, p. 21);
- that certain alleged discrimination appears to violate federal law, p. 6;
- that the Texas antitrust act applies to community centers and the counties which form and fund them, p. 13;
- that Tom Green County is a controlling principal of Concho Valley, p. 14;
- that Tom Green County is vicariously liable for Concho Valley's alleged antitrust violations, p. 14;

•that Petitioner is suing under a private attorney general statute which benefits consumers of mental retardation services, p. 15;

•that a lawfully organized community center is an unincorporated association, pp. 16-17;

•that a lawfully organized community center is operated by the governmental agencies which establish it, pp. 16-17;

•that a community center is not a distinct, self-supporting entity, p. 17; and,

•that there is no evidence of a good faith, colorable attempt to create a community center, p. 28.

Petitioner has also omitted a number of material facts. These omitted facts are discussed below.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to establish jurisdiction.

2. Petitioner has failed to demonstrate that the questions presented were raised in the lower courts.

3. Petitioner has failed to demonstrate that Petitioner has standing to raise the questions presented.

4. Petitioner's argument is necessarily dependent upon a construction and application of certain aspects of Texas law, which construction and application was resolved against Petitioner by the courts of Texas in circumstances under which the United States Supreme Court has traditionally declined to undertake an independent analysis of state law.

5. Petitioner has omitted material facts.

6. The Texas Third Court of Appeals identified an alternative independent state-law ground for determining that Tom Green County can have no antitrust liability.

7. Respondent Tom Green County presented other alternative independent state-law grounds for determining that Tom Green County can have no liability, which grounds were not completely reached by the Third Court of Appeals. These grounds are not addressed by Petitioner.

ARGUMENT

Jurisdiction

The questions raised by Petitioner are not truly federal questions such as would support Supreme Court jurisdiction. *See* 28 U.S.C. § 1257. Questions 1-4 actually touch and concern a construction of the Texas antitrust statute. As noted above, to the extent that federal antitrust law was raised below, it was presented only as an aid to construction of Texas antitrust law.

Although Question 5 seemingly raises a federal question – because it concerns due process – the issue actually touches and concerns an issue of local interest (entity formation under Texas law) which issue was resolved by the Texas courts in circumstances under which the United States Supreme Court has traditionally declined to undertake an independent analysis of state law. The Supreme

Court considers itself bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993).

Preservation

Furthermore, Petitioner has not demonstrated that the questions presented were properly raised (preserved) in the lower courts. For example, in undertaking to establish that Questions 1-4 were raised in the trial court, Petitioner relies upon a summary judgment response which was directed against motions for summary judgments filed by parties other than Tom Green County. (PWC, pp. 8-9) Because this summary judgment response (CR255) does not reference Tom Green County's motion for summary judgment, Petitioner has not demonstrated that Questions 1-4 were preserved for the purpose of reviewing the summary judgment granted to Tom Green County.

Likewise, Petitioner has failed to demonstrate that Question 5 (due process) was preserved for review. Petitioner alleges that Question 5 was raised in the trial court by a different summary judgment response (CR2994-2999), wherein Petitioner "pleaded that fact issues existed regarding whether a contract had been signed to create CONCHO VALLEY and whether the principals had made a colorable, good faith effort to establish CONCHO VALLEY." (PWC, p. 10)

However, because this entity-formation issue was part and parcel of numerous theories of recovery, including state-law theories of recovery,[5] Petitioner has not demonstrated that the summary judgment response relied upon by Petitioner (which does not tie the entity-formation issue to a due process complaint) is sufficient to raise the due process question as an issue which would defeat the motions for summary judgment. The 54-page summary judgment response relied upon by Petitioner does not even mention due process. (CR2971-3024)

Although Petitioner also alleges that the due process question was raised by its pleadings and by its trial brief (PWC, p. 10), under Texas summary judgment practice neither pleadings nor trial briefs can raise issues which will avoid summary judgment. *See Cook Composites, Inc. v. Westlake Styrene Corporation*, 15 S.W.3d 124, 140 (Tex.App. – Hou. [14th Dist.] 2000, pet. dism'd) (for the purpose of avoiding summary judgment, an issue is waived if not raised in both the pleading and the response to the motion for summary judgment); *Cornerstone Municipal Utility District v. Monsanto Company*, 889 S.W.2d 570, 574 (Tex.App. – Hou. [14th Dist.] 1994, writ den.) (summary judgment could not be avoided by issue raised in brief). Under Texas practice, in order to raise an issue which will

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[5] The entity-formation issue was the basis for complaint under a number of state-law theories of recovery, including alleged violations of the Deceptive Trade Practices Act (CR1408-1411 – alleging that defendants misrepresented Concho Valley to be a lawfully formed community center) and the Persons With Mental Retardation Act (CR1422 – alleging that defendants allowed Concho Valley to pose as a lawfully formed community center).

avoid summary judgment, the issue must be expressly set out in the response to the motion for summary judgment. *Cornerstone*, 889 S.W.2d at 574.

Additionally, Petitioner has failed to demonstrate that the questions presented were raised in the Supreme Court of Texas. For jurisdiction, Petitioner relies upon 28 U.S.C. § 1257, which authorizes the United States Supreme Court to review final judgments or decrees rendered by "the highest court of a State in which a decision could be had." However, Petitioner complains about the judgment of the Third Court of Appeals – an intermediate Texas Court – and makes no effort to demonstrate that the questions presented were specifically raised in the Supreme Court of Texas (Texas' highest court).

Moreover, a number of additional issues argued in the Petition for Writ of Certiorari are not shown to have been raised in the Texas courts. These issues include the applicability of federal Medicaid law (PWC, p. i), the applicability of the Americans With Disabilities Act (PWC, p. 15), and the issue of whether the Texas community center statute is void for vagueness (PWC, pp. 26-27).

Standing and Alternative State-Law Ground

Furthermore, Petitioner has failed to demonstrate that Petitioner has standing to raise the questions presented. The question of standing is not subject to waiver. *United States v. Hays*, 515 U.S. 737, 742 (1995). It is the burden of the party who seeks the exercise of jurisdiction to allege facts showing that he is a proper party to invoke judicial resolution of the dispute. *Hays*, 515 U.S. at 743.

The constitutional minimum of standing contains three elements: (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and, (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Hays*, 515 U.S. at 742-43.

As regards injury in fact, Petitioner to a large extent complains about injury allegedly sustained by persons other than Petitioner and in this regard has failed to demonstrate that Petitioner has suffered an injury in fact. *See e.g.* PWC, p. i (complaining about conduct alleged to impact disabled citizens), p. 9 (complaining that consumers and their families were denied the right to make placement decisions; complaining that consumers were denied right to choose providers), p. 12 (complaining that mentally retarded citizens were denied vital services), p. 15 (arguing that the ADA directs that disabled citizens not be denied the benefit of a public entity's services and activities). A generalized grievance against allegedly illegal governmental conduct will not support standing to invoke the federal judicial power. *Hays*, 515 U.S. at 743.

Petitioner also lacks standing to complain about Concho Valley's status and about the method by which Concho Valley's status was determined. There is simply no cause in fact between Concho Valley's status and the injury allegedly sustained by Petitioner. For example, the record does not show that the injury allegedly sustained by Petitioner would have been avoided if the entities which formed Concho Valley had entered into the written

contract that Petitioner alleges to be lacking (being the procedural defect alleged by Petitioner). Furthermore, under Texas law the status of an entity created and existing under color of a valid law may be challenged by the state (via a quo warranto proceeding) but may not be challenged by a private individual. *Walling v. North Central Texas Municipal Water Authority*, 348 S.W.2d 532, 533 (Tex. 1961).

Finally, as regards standing, Petitioner has failed to demonstrate a likelihood that the injury alleged will be redressed by a favorable resolution of the antitrust questions presented (Questions 1-4). Even if these questions were resolved in favor of Petitioner, the outcome would not be changed – the summary judgment on the antitrust claims is supported by alternative independent state law grounds.

For example, in Question 1 Petitioner argues that the LGAA antitrust exemption permits antitrust injunctive relief but not antitrust damages. (PWC, p. i) However, Petitioner did not seek injunctive relief against Tom Green County. (CR2,78,1123,1331,2383) Therefore, the resolution of Question 1 cannot affect Tom Green County – the question is moot.

For further example, the Texas Third Court of Appeals identified an alternative state-law ground for determining that Tom Green County can have no antitrust liability, which ground does not touch and concern any federal question (assuming only for the sake of argument that there is a federal question). In this regard, the Third Court of Appeals noted that the Texas antitrust act contains its own state action exemption (herein, the Texas

state action exemption) which prevents Tom Green County from having any antitrust liability. (Appendix, p. 26) This application of the Texas state action exemption does not touch and concern the LGAA (Question 1), the *Parker* state action doctrine (Questions 2-4), or the means by which Concho Valley was formed (Question 5).

As regards the Texas state action exemption, it must be noted that Petitioner, in copying the Texas Third Court of Appeals opinion into the Appendix, omitted the following key paragraph:

> In addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power." See Bus. & Com.Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against CRS on its antitrust claims against Concho Valley and Central Plains.

Compare Concho Residential Services, Inc. v. MHMR Services For The Concho Valley, 1999 WL 644727, unpublished slip opinion at p. 3 (Tex.App. – Austin 1999, rev. den.) (paragraph included) *with* the text of the opinion as copied at page 25 of the Appendix (paragraph omitted).

The omitted paragraph serves to place in context the Court of Appeals' determination that the Texas state action exemption precludes Tom Green County from having any antitrust liability. The Court of Appeals held as follows:

> Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. See id. § 15.05(g). Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

(Appendix, p. 26)

Omission of Material Facts

The omission discussed above and Petitioner's omission of other material facts (such as facts which are material to the creation of an MHMR community center, discussed below) will alone justify denial of the Petition for Writ of Certiorari. *See* Rules of the Supreme Court of the United States, Rule 14(h)(4) (failure to accurately present facts will justify denial of petition).

Petitioner argues that the entities which formed Concho Valley did not enter into a written contract and contends that a statutory prerequisite to making Concho Valley an MHMR community center was, as a consequence, never met. Petitioner would have the courts "invalidate Concho Valley and Central Plains' 30-year history as legally created community centers for lack of written contracts at their inception." (Appendix, p. 28 – Texas Third Court of Appeals opinion)

However, the Texas Third Court of Appeals held that Concho Valley was formed under the original (1965) version of the statute, which statute did not require – as a condition to establishing a community center – that the

participating local agencies enter into a formal contract (much less a written contract). (Appendix, pp. 26-27) Instead, the original statute provided that one or more participating agencies "may cooperate, negotiate and contract with each other through their governing bodies to establish and operate a community center." (Appendix, pp. 26-27) The Court of Appeals held that the phrase "cooperate, negotiate and contract" is broad enough to permit agencies to establish a community center through mere cooperation – without the formalities of a contract. (Appendix, p. 27)

Petitioner takes issue with the Texas Third Court of Appeals' statutory construction. Petitioner invites the United States Supreme Court to conduct its own review of the Texas community center statute. Petitioner would have this Court construe the statute to require the participating local agencies to form the community center by written contract.

However, as noted above, this Court considers itself bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). The Court even defers to lower federal court constructions of a state statute unless such constructions constitute plain error. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880 (1992). The Court defers to the lower federal courts because it considers them to be better schooled in and more able to interpret the laws of their respective states. *Casey*, 505 U.S. at 880.

Under this rationale, the Court would properly decline to apply its own construction of the Texas statute which governs formation of community centers. For the

same reasons, this Court would properly decline to construe the Texas antitrust act in a manner that is inconsistent with the construction applied by the Texas Third Court of Appeals.

The summary judgment record (portions of which are not discussed by Petitioner) conclusively establishes that prior to September 1, 1969 (when the statute was amended to require a contract – but not a written contract) several entities had cooperated to establish Concho Valley as a community center. In this sense, there was a meeting of the minds, and thus a contract, if such be necessary. At the very least, the minimum requirements of due process were satisfied.

For example, the Board of Trustees that operates Concho Valley[6] met as early as 1966 and adopted a constitution and by-laws as early as 1967. (CR1607-20) Additionally, by a 1968 letter to Tom Green County's county judge, the chairman of Concho Valley's Board of Trustees wrote that the Board "has been charged by the Commissioners Court and other local agencies with the responsibility of developing a plan to provide mental health and mental retardation services to the residents of Tom Green County." (CR1968) Furthermore, on October 15, 1984 (long before this controversy arose) the Tom Green County Commissioners Court approved a recommendation of the liaison representative committee (recommending the reappointment of Concho Valley trustees) which

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[6] The summary judgment record often contains reference to the Mental Health/Mental Retardation Center for Greater West Texas. That is the name by which Concho Valley was originally known. (CR1988-89)

committee reported that several cooperating agencies (Angelo State University, City of San Angelo, San Angelo ISD, and Tom Green County) had established Concho Valley in 1966. (CR2489-90)

If written documentation should be deemed necessary, then the summary judgment record contains an abundance of additional writings which, considered with the foregoing, are sufficient to bind the respective entities to having established Concho Valley. In 1966 the City of San Angelo agreed to provide water and other services to Concho Valley (CR1970); as early as 1966 and in successive years the San Angelo School District Trustees appointed delegates to select Concho Valley's board of trustees (CR3649,3653,3658); as early as 1967 the Tom Green County Commissioners Court approved funding for "the County's share of office and secretarial expenses for" Concho Valley (CR1966,1988-89); in 1968 the Commissioners Court again approved Concho Valley funding and approved appointments to the committee which was to select Concho Valley's trustees (CR1967,2455); as early as 1968 the San Angelo School District approved Concho Valley's trustees' request for eight months of funding and instructed the school superintendent to inform Concho Valley's trustees that the School District is "fulfilling their responsibility" by furnishing teachers in the field of special education (CR3650-51); in 1968 the School District let Concho Valley lease school-owned buildings without charge (CR3654-55); in 1968 Concho Valley's trustees requested additional funding from the Tom Green County Commissioners Court and the Commissioners Court authorized three years of funding for "the county's share" in the establishment of a Concho Valley clinic

(CR1968,1971); in 1968 the Tom Green County Commissioners Court filed for record Concho Valley's Plan for Services (CR1972); as early as August 10, 1968 Concho Valley had applied for and had been approved for a state grant (CR1988-89,1654-55); on January 28, 1969 Concho Valley's chairman of the board of trustees and Concho Valley's executive director reported to the San Angelo City Council that Tom Green County had agreed to fund a local MHMR center for San Angelo (CR1985,1988).

Beyond the year 1969, there is additional evidence supporting the conclusion that Concho Valley had been established (by written contract, if that be necessary). On August 29, 1983 the Tom Green County Commissioners Court approved and authorized the county judge to sign a contract with Concho Valley, a copy of such signed contract being in the record, whereby the County retained Concho Valley to perform MHMR services (CR2483,2485,2478-2481); the Tom Green County Commissioners Court approved reappointments to Concho Valley's board of trustees covering the years 1970-1994 (CR2457-2527); Concho Valley's board selection policies were formally incorporated into a document entitled, "Board Appointment Procedures" which was adopted by the sponsoring agencies in 1989 (CR3859-64,3871-77).

Other Alternative State-Law Grounds Not Completely Reached

Finally, Tom Green County presented other alternative independent state-law grounds for determining that Tom Green County can have no liability, which grounds were not completely reached by the Texas Third Court of

Appeals and which grounds are not addressed by Petitioner. In this regard, Tom Green County argued: (1) that the Texas antitrust act does not waive Tom Green County's own sovereign immunity, (2) that even if Tom Green County could have antitrust liability or other liability, the summary judgment evidence conclusively negates any liability; (3) that Tom Green County cannot be derivatively liable for any wrong committed by Concho Valley because there is no statutory basis for such derivative liability; (4) that even if there were a statutory basis for such derivative liability, any immunity enjoyed by Concho Valley inures to the benefit of Tom Green County, (5) that Concho Valley's agents are entitled to official immunity (such immunity inuring to the benefit of Concho Valley and to Tom Green County to the extent the County is alleged to be derivatively liable); and, (6) that even if the parties lacked sovereign and official immunity, Tom Green County can have no liability because the County committed no offense, Concho Valley committed no underlying offense, and other principles of law preclude imputing Concho Valley's conduct to the County. (Tom Green County's Appellee's Brief, pp. 5-7, 23-32)

Because a Texas county is a body politic of the State, a Texas county (like the State of Texas) is not liable for the torts of its officials, officers, agents, servants, or employees, and no recovery of damages can be had against a county unless liability be created by statute. *Wade v. Jackson County*, 547 S.W.2d 371, 373 (Tex.Civ.App. – Corpus Christi 1977, writ ref'd n.r.e.); *see Firemen's Insurance Company of Newark v. Board of Regents*, 909

S.W.2d 540, 543 (Tex.App. – Austin 1995, writ den.) (counties are not responsible for damages caused by neglect or wrong committed by their officers).

Where there is any uncertainty as to whether the sovereign immunity of a Texas governmental entity has been waived by the Texas Legislature, that uncertainty necessitates a finding that immunity has not been waived. A Texas governmental entity is immune from both suit and liability in the absence of an express waiver. *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876, 879 (Tex.App. – Beaumont 1998, no pet.); *see Austin Transportation Study Policy Advisory Committee v. The Sierra Club*, 843 S.W.2d 683, 690 (Tex.App. – Austin 1992, writ den.) (absent an express waiver of governmental immunity from liability, a party cannot obtain an award of attorney fees from a governmental unit). If the Texas Legislature undertakes to waive sovereign immunity, it must do so by clear and unambiguous language. *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

The uncontroverted summary judgment evidence establishes that Tom Green County did not participate in, approve, or ratify the wrongful acts by which Petitioner alleges to have been harmed. The county commissioners court is a Texas county's governing body. *Nueces County v. DePena*, 953 S.W.2d 835, 836 (Tex.App. – Corpus Christi 1997, no writ). A Texas county can act only through its commissioners court. *Id.*; *Renfro v. Shropshire*, 566 S.W.2d 688, 692 (Tex.Civ.App. – Eastland 1978, writ ref'd n.r.e.).

The uncontroverted affidavit of the former County Judge of Tom Green County establishes the following: (1) the Tom Green County Commissioners Court did not

participate in the operations, administration, management, or policy-making of Concho Valley; (2) the only actions taken by the Commissioners Court in relation to Concho Valley was in funding and in appointing trustees; and (3) the Commissioners Court did not commit, participate in, collude with, authorize, or ratify Concho Valley's claimed acts or omissions. (CR1074-75)

Even if Tom Green County could be derivatively liable for Concho Valley's conduct, any immunity enjoyed by Concho Valley would inure to the benefit of Tom Green County. *See DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995). Additionally, the official immunity enjoyed by Concho Valley's agents inures to the benefit of Tom Green County to the extent that the County is alleged to be derivatively liable for the conduct of Concho Valley. *See DeWitt*, 904 S.W.2d at 654.

CONCLUSION

For the reasons set out above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES DAVID WALKER
Counsel of Record
701 Brazos Street, Suite 500
Austin, Texas 78701
Ph: (512) 320-9129
Fax: (512) 320-5821

CHARLES J. WITTENBURG
DAVIS, HAY, WITTENBURG, DAVIS & CALDWELL, L.L.P.
P.O. Box 271
San Angelo, Texas 76902-0271
Ph: (915) 658-2728
Fax: (915) 655-2278

Counsel for Respondent Tom Green County (Texas)